LAWRENCE E. FELDMAN & ASSOCIATES
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. FELDMAN d/b/a :
LAWRENCE E. FELDMAN :
& ASSOCIATES :
432 Tulpehocken Avenue :
Elkins Park, PA 19027 :
v. :
:
GOOGLE, INC. :
.1600 Amphitheatre Parkway : **No. 06-cv-2540**
Mountain Valley, CA 94043 :
______________________________:

COMPLAINT

Plaintiff by and through its undersigned counsel, brings this action against Defendant, and in support thereof avers as follows:

1. Plaintiff Lawrence E. Feldman d/b/a Lawrence E. Feldman & Associates is an unincorporated law firm with an office in Montgomery County, the Commonwealth of Pennsylvania. The firm practices in the five county area, including Philadelphia County and advertises in print media in those counties as well as on the Internet.

2. Defendant Google, Inc. is a corporation organized under the laws of the State of Delaware, with its principle place of business in Mountain View, California. Google provides Internet search engine services to Internet users and advertising services to individuals, businesses as well as governmental and educational entities.

3. This cause of action arose out of transactions or occurrences which took place in whole or in part in Philadelphia.

4. This Court has personal jurisdiction over the Defendant.

Dockets.Justia.com

FACTS

5. On or about January 2003, Plaintiff purchased advertising from Defendant's "AdWord" Program wherein Defendant was to provide internet advertising services through it "Google Adwords" program in exchange for payment from Plaintiff per click as explained in the following paragraphs.

6. This AdWord program is keyword-triggered much like Google's traditional search engine service, whereby a potential consumer/customer enters a search word or words in Google's search engine, which results in a hierarchy of website links of business or other entities that signed up with AdWords to have their business website link be among the search results for those words. In this way, the consumer is likely to then "click" on the advertiser's web link, giving the advertiser the opportunity to sell its goods or services to that customer.

7. Advertisers can purchase as few or as many key or "Adwords" as they wish. Many law firms have used the Adwords campaign to advertise for clients. For example, Plaintiff purchased Adword "Vioxx" at or around the time when the arthritis medication Vioxx was removed from the market. People searching on Google for a law firm handling injuries from Vioxx would see Plaintiff's website as one of their search results.

8. If the searcher clicked on Plaintiffs' website, then Defendant would charge Plaintiff for that click. This is now widely known as "pay per click" advertising. According to Defendant's website "With Google AdWords you create your own ads, choose keywords to help us match your ads to your audience and pay only when someone clicks on them."

9. Advertisers such as Plaintiff make bids for the key words that will trigger their advertisements to appear in a search performed by a potential customer. The highest bidder for a key word or phrase will find its ad at the top of the list of a search result performed by a potential consumer. Advertisers such as Plaintiff, are charged by Defendant for each and every time someone clicks on its advertisement (typically, a hyperlink to the advertiser's own website).Charges can average as low as 50 cents, but can be as high as $60 or $70 per key word for those words that are heavily sought after, such as Vioxx.

10. While Defendant touts that advertisers can reach more than 80% of Internet users, the "pay per click" system has a serious flaw. This flaw is known colloquially as "click

fraud." Defendant's name for it is "improper clicks."

11. These improper clicks or click fraud describe the practice of clicking(with a mouse) on a search advertisement with no intention of doing business with the advertiser. These ill-intended purposeful clicks are done to drive up the price an advertiser pays to Google by way of the "pay per click" model. Fraudulent clicks could be perpetrated by an advertiser's competitor, with the intent to use up a rival's advertising budget, causing the advertiser to cease advertising altogether, in an effort to boost their own position on the hierarchy, thereby stealing potential customers. Some of these perpetrators are even armed with software programs that automatically click on designated ads hundreds or thousands of times.

12. This fraudulent activity is preventable by using efforts to track the use of a pay per click advertisement, including who is doing the clicking and how often the same individual/entity clicks on it.

13. This tracking can be accomplished by computer programs that count the number of clicks originating from a single source and whether or not those clicks result in a sale. Another effective mechanism for tracking is to track it at the website on which the advertisement appears. Websites that host advertisements provide tracking data to Google with every click.

14. Google admitted that click fraud is a pervasive problem as recently as 2004 when its Chief Financial Officer, George Reyes, characterized it as "the biggest threat to the Internet economy." Later these fears were downplayed by Google's co-founder, Sergey Brin. In fact, some analysts believe that as many as 20% of clicks are fraudulent. Other studies show this number to be as high as 30%.

15. Google has in the past, provided a relatively small number of advertisers a refund on those clicks that it deems to be improper clicks, so Google has some mechanism in place to ascertain which clicks are improper or fraudulent after the fact.

16. In its 2005 Annual Report, Google stated that it was exposed to the risk of fraudulent clicks on its ads by persons seeking to increase the advertising fees paid to Google Network members. Approximately 99% of Google's revenue is derived from AdWords.

17. From the inception of its AdWords and AdSense Programs, Google took no effort to track or prevent the instance of click fraud and failed to adequately warn Plaintiff about it.

18. Starting in or around January 2003, Plaintiff purchased Adwords for Vioxx, Bextra, Celebrex and other advertising campaigns in an effort to steer potential clients who may have been harmed by these drugs which were under scrutiny by the FDA and one of which, Vioxx, that was voluntarily withdrawn from the market.

19. Plaintiff was charged approximately of $100,000.00 in AdWords between January 2003 and December 31, 2005.

20. Plaintiff contacted Defendant on April 14, 2006 to request an investigation of his account because he believed he was a victim of click fraud.

21. Defendant refused, stating that id does not keep any records on any account for more than the most recent three months.

22. Defendant claims that it does not keep any records on an advertiser's account and click history for more than the past three months.

23. Despite this fact, Defendant has its staff respond to requests for investigation and refund of advertising dollars by saying that it cannot conduct a full investigation because it has disclaimed liability for clicks older than 60 days. Google was unwilling to conduct an invalid click investigation for the dates Plaintiff selected. Thus, by its own business practices, Defendant has a built in system whereby it charges customers such as Plaintiff for clicks whether they are fraudulent or not.

COUNT I

(Breach of Implied Contract)

24. Plaintiff incorporates paragraphs 1 through 23 as though the same were set forth below at length.

25. On or about January 2003, Plaintiff purchased advertisements through Defendant Google's AdWords Program.

26. Based on the conduct between Defendant and Plaintiff an implied in law contract arose.

27. Defendant breached its implied in law contract by charging the Plaintiff for fraudulent clicks when Plaintiff only agreed to be charged for actual clicks.

28. As a direct and proximate result of Defendant's breach of implied contract,

Plaintiff has been suffered approximately $50,000.00 in damages.

COUNT II

(Breach of Implied Covenant of Good Faith and Fair Dealing)

29. Plaintiff incorporates paragraphs 1 through 28 as though the same were set forth below at length.

30. From this contract there existed an implied covenant of good faith and fair dealing which required Defendant to not do anything that would have the effect of injuring the Plaintiff's right to receive the full benefit of its products.

27. Nonetheless, during the time period between January 2003 and December 31, 2005, Plaintiff was the victim of click fraud.

28. Defendant breached this covenant of good faith and fair dealing by failing to protect Plaintiff from click fraud, even though Defendant was aware that this was a pervasive problem with its service. Defendant further breached this covenant of good faith and fair dealing by failing to take any significant measures to track or prevent click fraud, and failed to adequately advise and warn Plaintiff about this problem before entering into the Agreement.

29. Defendant further breached the Agreement by charging Plaintiff for fraudulent clicks, which was not agreed to by the parties. Plaintiff was only to be billed for actual clicks.

30. As a direct and proximate result of Defendant's breach of the covenant of good faith and fair dealing, Plaintiff has suffered approximately $50,000.00 in damages.

COUNT III

(Fraudulent Inducement)

31. Plaintiff incorporates paragraphs 1 through 30 as though the same were set forth below at length.

32. Defendant knowingly and willfully omitted to inform Plaintiff about the existence

and pervasiveness of click-fraud. Defendant knowingly misrepresented the safety and security of its pay-per-click advertising system.

33. Plaintiff relied on the false representations and omissions made by Defendant which induced him into paying for fraudulent clicks instead of only actual clicks. Had Plaintiff known about the problem of "click-fraud" he never would have purchased advertising with the Defendant.

34. As a result of Defendant's false representations, concealments, omissions and non-disclosures, Plaintiff sustained approximately $50,000.00 in damages.

COUNT IV

(Negligence)

35. Plaintiff incorporates paragraphs 1 through 34 as though the same were set forth below at length.

36. Defendant owed a duty to Plaintiff to monitor its Adwords program for click fraud and to protect Plaintiff from this unscrupulous practice by utilizing appropriate software and other measures to track fraudulent clicks so that Plaintiff would not be charged for them.

37. Defendant breached its duty to Plaintiff by billing Plaintiff for fraudulent clicks.

38. Defendant's breach of this duty was the proximate and direct cause of Plaintiff's damages in overpayment for advertising

39. Plaintiff sustained damages approximately $50,000.00 in damages.

COUNT V

(Unjust Enrichment)

40. Plaintiff incorporates paragraphs 1 through 39 as though the same were set forth below at length.

41. Defendant received money from Plaintiff for a specific purpose, to wit, to pay for actual, legitimate clicks to Plaintiff's advertisement through Defendant's Adwords Program.

42. Defendant has wrongfully charged Plaintiff for and received money belonging to Plaintiff which was not applied for the specific purpose of purchasing legitimate clicks on

Plaintiff's advertisements under the Adwords Program.

43. To the contrary, Defendant took Plaintiff's money and applied it toward all clicks on Plaintiff's advertisements under the AdWord Program, including fraudulent clicks.

44. Defendant has received approximately $50,000 which in equity and in good conscience it is not permitted to keep and therefore should be paid over to the Plaintiff.

45. Accordingly, Defendant must be disgorged of all improper monies it has received from Plaintiff.

COUNT VI
(Violation of Business Professions Code 17200, et. seq.)

46. Plaintiff incorporates paragraphs 1 through 45 as though the same were set forth below at length.

47. California Business & Professions Code § 17200 provides that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice."

48. Defendant's conduct in charging Plaintiff for fraudulent clicks constitutes an unlawful, unfair or fraudulent business act or practice under the Code.

49. Defendant's failure to keep computer logs on Plaintiff's entire Adwords campaign in order to track, monitor and refund any monies wrongfully charged to Plaintiff likewise constitutes and unlawful, unfair, or fraudulent business act or practice.

50. As a proximate result of Defendant's conduct alleged herein, Plaintiff has suffered approximately $50,000.00 in damages.

51. Unless restrained by this Court, Defendant will continue to engage in the unlawful ,unfair and fraudulent business practices alleged herein, violating Section 17200 of the Business and Professions Code.

53. Plaintiff is entitled to the disgorgement of any profits Defendant obtained as a result of its unlawful conduct and restitution of monies it paid for fraudulent clicks throughout

the period of its Agreement with Defendant.

WHEREFORE, Plaintiff demands judgment in its favor and against Defendant.

Dated: August 9, 2006

LAWRENCE E. FELDMAN & ASSOCIATES

BY: ______________________

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(215) 885-3302
(215) 885-3303

Attorney for Plaintiff

Google Inc. AdWords Program Terms

These Google Inc. AdWords Program Terms ("**Terms**") are entered into by you and Google Inc. ("**Google**") regarding the Google AdWords Program ("**Program**") as further described in the Program's frequently asked questions at https://adwords.google.com/support/bin/index.py?fulldump=1 (the "**FAQs**") (collectively, the "**Agreement**"). "You" or "you" means the party listed on the account you create and you represent you have the authority to agree to this Agreement for that party. You represent and warrant that you are authorized to act on behalf of, and bind to this Agreement, any third party for which you generate ads. You hereby agree and acknowledge:

1 **Policies.** Program use is subject to all applicable Google and Partner policies, including without limitation the Editorial Guidelines (adwords.google.com/select/guidelines.html), Google Privacy Policy (www.google.com/privacy.html) and Trademark Guidelines (www.google.com/permissions/trademarks.html). Policies may be modified any time. You shall direct only to Google communications regarding your ads on Partner Properties. Some Program features are identified as "Beta," "Ad Experiment," or otherwise unsupported ("**Beta Features**"). Beta Features are provided "as is" and at your option and risk. You shall not disclose to any third party any information from, existence of or access to Beta Features. Google may modify ads to comply with any Google Property or Partner Property policies.

2 **The Program.** You are solely responsible for all: (a) keywords and ad targeting options (collectively "**Targets**") and all ad content and ad URLs ("**Creative**"), whether generated by or for you; and (b) web sites proximately reachable from Creative URLs and your services and products (collectively "**Services**"). You shall protect your passwords and take full responsibility for your own, and third party, use of your accounts. Ads may be placed on (y) any content or property provided by Google ("**Google Property**"), and unless opted-out by you (z) any other content or property provided by a third party ("**Partner**") upon which Google places ads ("**Partner Property**"). Google or Partners may reject or remove any ad or Target for any or no reason. You may independently cancel online any campaign at any time (such cancellation is generally effective within 24 hours). Google may cancel immediately any IO, the Program or these Terms at any time with notice (additional notice is not required to cancel a reactivated account). Google may modify the Program or these Terms at any time without liability and your use of the Program after notice that Terms have changed indicates acceptance of the Terms. Sections 1, 2, 4,

5, 6 and 7 will survive any expiration or termination of this Agreement.

3 **Prohibited Uses.** You shall not, and shall not authorize any party to: (a) generate automated, fraudulent or otherwise invalid impressions or clicks; or (b) advertise anything illegal or engage in any illegal or fraudulent business practice in any state or country where your ad is displayed. You represent and warrant that (x) all your information is correct and current; (y) you hold and grant Google and Partners all rights to copy, distribute and display your ads and Targets ("**Use**"); and (z) such Use and websites linked from your ads (including services or products therein) will not violate or encourage violation of any applicable laws. Violation of these policies may result in immediate termination of this Agreement or your account without notice and may subject you to legal penalties and consequences.

4 **Disclaimer and Limitation of Liability.** GOOGLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION FOR NONINFRINGEMENT, MERCHANTABILITY AND FITNESS FOR ANY PURPOSE. Google disclaims all guarantees regarding positioning or the levels or timing of: (i) costs per click, (ii) click through rates, (iii) delivery of any impressions on any Partner Property or Google Property or sections of such properties, (iv) clicks or (v) conversions for any ads or Targets. EXCEPT FOR INDEMNIFICATION AMOUNTS PAYABLE TO THIRD PARTIES HEREUNDER AND YOUR BREACHES OF SECTION 1, TO THE FULLEST EXTENT PERMITTED BY LAW: (a) NEITHER PARTY WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, PUNITIVE, OR OTHER DAMAGES WHETHER IN CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY; AND (b) EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER IS LIMITED TO AMOUNTS PAID OR PAYABLE TO GOOGLE BY YOU FOR THE AD GIVING RISE TO THE CLAIM. Except for payment, neither party is liable for failure or delay resulting from a condition beyond the reasonable control of the party, including but not limited to acts of God, government, terrorism, natural disaster, labor conditions and power failures.

5 **Payment.** You shall be charged based on actual clicks or other billing methods you may choose online (e.g. cost per impression). You shall pay all charges in the currency selected by you via your online AdWords account, or in such other currency as is agreed to in writing by the parties. Charges are exclusive of taxes. You are responsible for paying (y) all taxes and government charges, and (z) reasonable expenses and attorney fees

EXHIBIT A

Google incurs collecting late amounts. You waive all claims relating to charges unless claimed within 60 days after the charge (this does not affect your credit card issuer rights). Charges are solely based on Google's click measurements. Refunds (if any) are at the discretion of Google and only in the form of advertising credit for Google Properties. You acknowledge and agree that any credit card and related billing and payment information that you provide to Google may be shared by Google with companies who work on Google's behalf, such as payment processors and/or credit agencies, solely for the purposes of checking credit, effecting payment to Google and servicing your account. Google may also provide information in response to valid legal process, such as subpoenas, search warrants and court orders, or to establish or exercise its legal rights or defend against legal claims. Google shall not be liable for any use or disclosure of such information by such third parties.

6 **Indemnification.** You shall indemnify and defend Google, its agents, affiliates, and licensors from any third party claim or liability (including without limitation reasonable legal fees) arising out of your Program use, Targets, Creative and Services and breach of the Agreement.

7 **Miscellaneous.** The Agreement must be construed as if both parties jointly wrote it, governed by California law except for its conflicts of laws principles and adjudicated in Santa Clara County, California. The Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. You may grant approvals, permissions and consents by email, but any modifications by you to the Agreement must be made in a writing (not including email) executed by both parties. Any notices to Google must be sent to: Google Inc., AdWords Program, 1600 Amphitheatre Parkway, Mountain View, CA 94043, USA, with a copy to Legal Department, via first class or air mail or overnight courier, and are deemed given upon receipt. Notice to you may be effected by sending email to the email address specified in your account, or by posting a message to your account interface, and is deemed received when sent (for email) or no more than 15 days after having been posted (for messages in your AdWords interface). A waiver of any default is not a waiver of any subsequent default. Unenforceable provisions will be modified to reflect the parties' intention, and remaining provisions of the Agreement will remain in full effect. You may not assign any of your rights hereunder and any such attempt is void. Google and you and Google and Partners are not legal partners or agents, but are independent contractors.

April 19, 2005